

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON JAMES RALPH,

Defendant-Appellant.

UNPUBLISHED

November 17, 2000

No. 214719

Montcalm Circuit Court

LC No. 98-000132-FC

Before: Neff, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and one count of attempted second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a) and MCL 750.92(2); MSA 28.287(2), involving digital and penile penetration and sexual contact with his seven-year-old stepsister.¹ We affirm.

Defendant first argues that the trial court abused its discretion by denying his motion for independent medical examinations of the victim and her twin sister. We review a trial court's decision on a discovery request for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998). A close decision on a discovery issue should not be reversed just because this Court would have ruled differently. *Id.*

The scope of discovery in a criminal prosecution is governed by MCR 6.201, which provides that defendant has a right to request access to information in the possession of the prosecution, including exculpatory evidence, documents the prosecution intends to introduce at trial, and reports of experts. MCR 6.201(A)(3), (A)(5), and (B)(1).² Although the court rule

¹ Defendant was acquitted on one count of second-degree criminal sexual conduct premised on his alleged touching of the victim's twin sister.

² Defendant asserts that MCR 2.311(A) permits medical examinations where a party's medical condition is at issue. However, the court rule on which defendant relies is a rule of civil procedure that is not generally applicable to criminal cases. MCR 2.001. The correct analysis, therefore, is whether the trial court properly exercised its discretion in denying defendant's request for discovery beyond the scope of MCR 6.201.

does not address medical examinations of victims, the trial court has the discretion to order additional discovery. *People v Valeck*, 223 Mich App 48, 50; 566 NW2d 26 (1997). Discovery should be granted where the information sought is necessary to a fair trial or preparation of a defense, however it should not be granted where to do so merely allows a fishing expedition. *People v Graham*, 173 Mich App 473, 477; 434 NW2d 165 (1988).

We agree with the trial court that the requested examinations would have been intrusive to the victim and her sister and were not likely to have provided evidence that would be beneficial to defendant. The girls were examined in October 1997, several months before defendant filed this motion and more than a year after the alleged abuse occurred. The physician assistant who conducted the examinations stated that on the basis of her medical findings she could not conclude that the girls were abused. It is unlikely that an examination conducted in July 1998, when defendant brought this motion, would have provided evidence that was more conclusive or more beneficial to defendant. Furthermore, defendant did not make a sufficient showing that the information sought was necessary to prepare his defense or to ensure a fair trial. *Id.* The trial court properly exercised its discretion in denying defendant's discovery request.

Defendant also argues that the prosecutor impermissibly withheld evidence of the girls' physical examinations. Because defendant failed to raise this issue before the trial court, our review is limited to whether the prosecution's delay in disclosing this evidence could have been decisive of the outcome. *People v Grant*, 445 Mich 535, 552-554; 520 NW2d 123 (1994).

Defendant has a due process right to access certain information possessed by the prosecution, including evidence that might lead a jury to entertain reasonable doubt about his guilt. *People v Lester*, 232 Mich App 262, 280; 591 NW2d 267 (1999). To establish a violation of this right, the defendant must prove that (1) the state possessed evidence favorable to his defense, (2) he did not possess the evidence nor could he have obtained it himself with reasonable diligence, (3) the prosecution withheld the favorable evidence, and (4) had the evidence been disclosed to defendant, a reasonable probability exists that the outcome of the proceedings would have been different. *Id.* at 281.

Defendant does not allege that the prosecution completely failed to turn over the evidence, arguing instead that the prosecution delayed in releasing the records of the victim's medical examinations and that this delay prejudiced his ability to obtain an order for independent medical examinations. However, defendant has failed to prove any of the four elements of the due process test cited in *Lester*. In particular, defendant fails to state how an earlier release of the information would have altered the trial court's ruling on his motion for independent medical examinations, and thus how it would have favorably affected the outcome of his trial. The trial court denied defendant's motion because it was intrusive and unnecessary. The fact that physical examinations were conducted and that they were inconclusive supports the court's ruling. Because there is no reasonable probability that the trial court would have ruled differently on defendant's motion had the court been alerted to the existence of the earlier physical examinations, no due process violation occurred and we will not reverse defendant's convictions.

Defendant next argues that the trial court erred when it denied defendant's motion to suppress his confession because it was not voluntary. Whether a confession is voluntary is a

question of law. *People v Mack*, 190 Mich App 7, 17; 475 NW2d 830 (1991). We will not reverse the trial court's finding unless it is clearly erroneous. *Id.*

The statement of an accused made during custodial interrogation is inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment right against self-incrimination. *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). To determine whether defendant voluntarily, knowingly, and intelligently waived his right, this Court examines the totality of the circumstances surrounding the interrogation. *Id.* at 644-645. The voluntary nature of the statement is determined by examining the police conduct. *Id.* at 645. The court should consider various factors, including defendant's education or intelligence, his previous experience with the police, whether he was advised of his constitutional rights, whether he was injured, intoxicated or drugged, or in ill health when he gave the statement, whether he was deprived of food, sleep, or medical attention, whether he was physically abused, and whether he was threatened with abuse. See *People v Sexton*, 461 Mich 746, 752-753; 609 NW2d 822 (2000). The prosecutor has the burden of proving by a preponderance of the evidence that the defendant voluntarily waived his rights. *Abraham, supra* at 645.

In this case, defendant claims his confession was involuntary because he was promised leniency in his punishment. According to defendant, he never admitted to penetration, but did tell the police lieutenant that he might have accidentally touched the victim. Defendant also claims that the lieutenant told him that if he admitted to touching the victim's genitals, he would not receive prison time and would only get counseling.

Review of the lower court record reveals no evidence other than defendant's testimony supporting his contention that he was promised no jail time in exchange for a confession. In fact, the two police officers who were present during the interview testified that no such promise was made. However, even if we were to conclude that defendant was promised leniency if he signed the statement, the totality of the circumstances suggests that defendant's confession was voluntary. Defendant admitted that he was advised of his rights and that he was not under arrest at the time. He testified that, although he did not read the statement, he was capable of reading it and understanding it. There is no evidence to suggest that defendant was under the influence of alcohol or drugs, that he was deprived of sleep or food, that he was injured or in ill health, or that he was threatened or physically abused. Further, the record indicates that this was not defendant's first encounter with the police. Based on these facts, the trial court's conclusion that a reasonable person would find defendant's confession to be voluntary was not clearly erroneous and the court did not err as a matter of law by refusing to suppress the confession.

Defendant's next argument is that he received ineffective assistance of counsel. This Court reviews a claim of ineffective assistance of counsel to determine if the defendant has shown that counsel's performance was deficient and if there is a reasonable probability that, but for the deficient performance, the jury would not have convicted the defendant. *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000). Because defendant failed to request an evidentiary hearing, review is limited to the existing record. *Id.* at 423.

To prove a claim of ineffective assistance of counsel mandating reversal of his conviction, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and the representation so prejudiced the defendant that it deprived him of a

fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). In applying this test, the reviewing court presumes that counsel's conduct fell within a wide range of reasonable professional assistance and the defendant bears a heavy burden to overcome this presumption. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). If the defendant succeeds in proving that counsel's performance was objectively unreasonable, defendant must then show that, but for the unprofessional errors, the result of the proceeding would have been different. *Mitchell*, *supra* at 167.

Defendant claims ineffective assistance of counsel regarding three matters that occurred during his trial. First, defendant contends that his counsel failed to object to the testimony of a physician assistant regarding her examination of the victim and her sister, and failed to effectively cross-examine the witness regarding her conclusions. Defendant is correct that his trial counsel did not object to the witness' testimony, nor did he conduct a voir dire examination of the witness regarding her qualifications to testify as an expert. However, the record indicates that the prosecution never offered the witness as an expert on sexual abuse. Although the witness did offer opinions regarding the findings of her physical examination of the girls, such as her assertion that she could not conclude that the girls had been sexually abused, that testimony was generally favorable to defendant. The only part of the witness' testimony that was potentially harmful to defendant was her statement that the victim's hymen was missing and that if penetration did occur, she would expect to find no hymen. However, the witness admitted that a missing hymen is a normal finding in a girl of the victim's age. We conclude that trial counsel's decision not to object to this benign testimony or to cross-examine the witness further was not objectively unreasonable.

Defendant also contends that his counsel was ineffective because he did not cross-examine the victim's mother regarding her possible involvement in the sexual abuse of the girls or her motive for fabricating the abuse. Review of the record indicates no evidence to suggest that the victim's mother played any role in sexually assaulting her child. To the contrary, the evidence presented at trial indicated that she was not aware of the abuse until months after it happened. Trial counsel's decision not to pursue this defense theory was not objectively unreasonable. Further, any motive the mother would have to plant the idea of abuse in her child's head was fully explored through the introduction of evidence that the mother had an inappropriate sexual relationship with defendant and that the conclusion of that relationship created conflict between the parties. Generally, decisions regarding whether to cross-examine a witness and how extensively to conduct that examination are matters of trial strategy that this Court should not second-guess. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999); *People v Burns*, 118 Mich App 242, 247; 324 NW2d 589 (1982).

Lastly, defendant contends that his counsel was ineffective in failing to object to the continued involvement of a juror who apparently knew relatives of defendant. The record is not clear on how the court learned about the juror's familiarity with defendant's family. However, at the conclusion of the parties' proofs and before closing arguments, the court excused the rest of the jury and questioned her. According to the juror, she knew some persons named Ralph from school, but she did not know defendant or any of his family members who testified at trial and was not familiar with any of the witnesses or spectators in this case. Neither defense counsel nor the prosecutor objected on the record to the juror continuing to serve on the jury panel.

Defense counsel's decision not to challenge the juror's competence to serve on the jury was not objectively unreasonable. Based on her answers to the questions posed by the court, defense counsel could not have successfully challenged her for cause. Given that the jury was sworn prior to learning this information, defendant no longer had the right to remove the juror through a peremptory challenge. *People v Daoust*, 228 Mich App 1, 7; 577 NW2d 179 (1998). Even if defense counsel could have asked the court to remove her for cause or for any other reason, the failure to challenge a juror for cause or to exercise a peremptory challenge is a matter of trial strategy that seldom constitutes ineffective assistance of counsel. *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986); *People v Pawelczak*, 125 Mich App 231, 242; 336 NW2d 453 (1983). Defense counsel apparently and properly concluded that any challenge to this juror would be unsuccessful, and his decision not to object to her continued presence on the jury was not objectively unreasonable.

Even assuming defense counsel's decisions were not objectively reasonable, any such deficient performance likely had no effect on defendant's case. The prosecution presented testimony of the victim that defendant penetrated her vagina with his fingers and penis and tried to make her touch his penis. The victim's other brother corroborated her story that she was locked in the bathroom with defendant and that she was undressed. Based on this evidence, a reasonable juror could have concluded that defendant committed the criminal sexual conduct offenses of which he was convicted. Accordingly, defendant has failed to show that but for defense counsel's alleged errors, he would not have been convicted. *Mitchell, supra* at 167.

Next, defendant argues that the trial court abused its discretion by allowing the juror who knew defendant's family to remain on the jury. Because defendant did not challenge the juror for cause or otherwise object to her continued presence on the jury, review is limited to whether the failure to dismiss this juror resulted in manifest injustice. *People v Coles*, 79 Mich App 255, 264; 261 NW2d 280 (1978).

Defendant's right to a jury trial includes the right to a fair and impartial jury. *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996). Defendant has a constitutional right to challenge jurors for cause, and that right may exist even when the ground for challenging the juror is not discovered until after trial. *Daoust, supra* at 8-9. A defendant is denied his right to an impartial jury when a juror who should be removed for cause is allowed to remain on the jury panel. *Id.* When information potentially affecting a juror's ability to act impartially is discovered after the jury is sworn, a defendant is entitled to relief on appeal only if he can establish that (1) he was actually prejudiced by the juror's presence, or (2) he could have successfully challenged the juror for cause. *Id.* at 9.

Defendant's argument that the trial court should have removed this juror for cause is without merit. Not one of the grounds for challenging a juror for cause stated in MCR 2.511(D) applies to this case. Defendant does not argue, and the record does not show, any reason to believe that the juror's acquaintance with distant members of defendant's family would bias or prejudice her against defendant. Jurors are presumed to be competent and impartial, and the burden is on defendant to prove that a given juror has prejudices that would impair her capacity to render a fair and impartial verdict. *People v Walker*, 162 Mich App 60, 63; 412 NW2d 244 (1987). Defendant has failed to establish that the juror's familiarity with defendant's family

members who were not involved in this trial was sufficient ground for challenging this juror for cause.

If the juror could not have been dismissed for cause, then the trial court's verdict should not be reversed unless defendant is able to show that the continued presence of the juror on the jury panel resulted in actual prejudice. *Daoust, supra* at 9. Defendant's only argument suggesting actual prejudice is that his counsel was unable to exercise a peremptory challenge against this juror during voir dire because this information was not available. However, the defendant's inability to exercise a peremptory challenge does not rise to the level of prejudice or manifest injustice that requires reversal of the verdict because the defendant has no constitutional right to peremptory challenges. *Id.* at 7. We conclude that no manifest injustice resulted.

Finally, defendant argues that two incidents of prosecutorial misconduct occurred during trial. Defendant failed to object to either occurrence of alleged misconduct. Therefore, our review is limited to whether the conduct was so egregious that no instruction could have removed the prejudice to defendant or whether manifest injustice would result from this Court's failure to review the alleged misconduct. *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995).

First, defendant contends that the prosecutor failed to correct the false testimony of the police witnesses. The test for prosecutorial misconduct requiring reversal of the conviction is whether the defendant was denied his right to a fair and impartial trial. *Id.* at 342. The prosecutor may not knowingly use false testimony to obtain a conviction and has a duty to correct false evidence. *Lester, supra* at 276. A prosecutor's failure to correct false testimony does not require reversal and remand for a new trial unless there is a reasonable likelihood that it affected the judgment of the jury. *People v Wiese*, 425 Mich 448, 454; 389 NW2d 866 (1986); *Lester, supra* at 280.

Defendant claims that the police lieutenant who interviewed him gave false testimony when he stated at trial that defendant checked off each of his rights as he read them from the printed polygraph waiver form. According to defendant, this testimony was contradicted by the lieutenant's testimony at the hearing on defendant's motion to suppress evidence where the lieutenant claimed that he checked the rights on the form as he read them to defendant.

It appears that there is an inconsistency between the lieutenant's trial testimony and his earlier testimony at the motion hearing. However, the key factor in this analysis is whether the prosecutor knew that the testimony was false. Because neither the prosecutor nor defendant questioned the witness regarding this inconsistency, it is impossible to determine from the record whether the prosecutor was aware of the inconsistency. It is equally impossible to determine which version of the facts was the accurate statement. Further, the fact that another witness testified at trial that she watched the interview and that it occurred as the lieutenant's trial testimony indicated suggests that the version of events presented at trial was accurate. Based on these facts, defendant cannot prove that the prosecutor knew that the lieutenant's testimony was false.

Defendant also alleges that another police officer testified falsely at trial that there was an allegation of digital penetration prior to defendant's interview. This argument is based on

defendant's claim that the testimony was inconsistent with the incident report prepared by the police officer witness after her interview of the victim and her sister. Review of the lower court record indicates that the incident report was never introduced at trial or otherwise made a part of the record. Because appellate review is limited to the trial court record, we decline to review defendant's argument regarding the alleged inconsistencies between the officer's testimony and her report. *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998), rev'd on other grounds 462 Mich 415 (2000).

Finally, defendant contends that the prosecutor committed misconduct by suggesting during her closing argument that the jury did not need more evidence than defendant's confession to convict him of the crime. Such claims are reviewed case by case. *Rice, supra* at 435; *Paquette, supra* at 342. This Court reviews the pertinent portions of the record and evaluates the remarks in context to determine whether the defendant was denied a right to a fair and impartial trial. *Rice, supra* at 435. The prosecutor's comments must be read as a whole and evaluated in light of the defendant's arguments and the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Prosecutorial remarks do not require reversal if they are responsive to issues raised by the defendant. *Id.*

Reviewing the context of the statement, it is apparent that the prosecutor was listing the evidence that corroborated the victim's testimony. Contrary to defendant's argument, the prosecutor was not suggesting that the jury could convict defendant based solely on his confession, but that, in addition to the victim's testimony, the jury could consider defendant's confession as corroborating evidence. This remark was also responsive to the theory raised by defendant that he did not confess to sexually molesting the victims, and as such, was not an improper statement. *Id.* The comment in question did not constitute prosecutorial misconduct and did not result in manifest injustice.

Affirmed.

/s/ Janet T. Neff
/s/ William B. Murphy
/s/ Richard Allen Griffin